KWIK-PAK (PRIVATE) LIMITED
versus
EDWARD MASHIRINGWANI
and
SHEPHERD MAKONI

HIGH COURT OF ZIMBABWE
KUDYA J
HARARE, 4 November 2009

Urgent Chamber Application

T Mpofu, for the applicant
G N Mlotshwa, for the first respondent
No appearance for the second respondent

KUDYA J: On 30 October 2009 the applicant company filed an urgent chamber application seeking spoliatory relief. The draft order was couched in these terms:

TERMS OF THE FINAL ORDER SOUGHT

That you show cause why an order in the following terms should not be granted;

1. That respondents or any person acting on their behalf shall be and are hereby barred from in any way interfering with applicant's possession and control of the portion of Friedwell Farm (that it controlled immediately before 29 October 2009), including in any way interfering with the possession by the applicant's workers of the farm compound and shall so refrain from any such future interference save as may be authorised by a binding and operational order of a court of competent jurisdiction.

2. That the first respondent shall pay costs of suit (if he opposes this application) and that such costs shall be at an Attorney-Client scale.

INTERIM RELIEF

Pending the return day, it is hereby ordered;

1. That the respondents or any person acting on their behalf or for the purpose of furthering their interests shall be and are hereby ordered to restore to the applicant's possession such amenities as were immediately before 29 October 2009 under the applicant's use and control including proper access to the main entrance to the farm, the piggery, the crocodile pens, the paddocks, the farm compound, the office house, until the finalization of this matter on the return date.

2. That the respondents shall not in any way stop the applicant's representatives and workers from accessing the piggery, the crocodile pens, the main entrance to the farm, the homestead, the compound and such amenities the applicant had access to immediately before 29 October 2009, until the finalization of this matter on the return date.

SERVICE OF THE PROVISIONAL ORDER

The applicant's legal practitioner shall be and are hereby granted leave to serve this provisional order upon the respondents.

On 4 November 2009, after hearing counsel, I delivered judgment and granted an order in terms of the first paragraph of the interim relief sought. In September 2010, the file of proceedings was brought to my attention with a request that I reduce my reasons to writing as the first respondents had noted an appeal against the provisional order on 5 November 2009.

The facts

It was common cause that Friedwell of Reinfield farm in Makonde District of Mashonaland West Province was compulsorily acquired by the State and the first defendant was on 27 July 2007 issued with an offer letter for the entire farm. In July 2007 the first respondent occupied a portion of the farm. The applicant remained on the portion that the first respondent could not occupy because it was being used by the applicant for pig, crocodile and cattle farming. On 29 October 2009 the second respondent, who happened to be the farm manager of the first respondent denied access to the piggery, paddocks and crocodile pens to the applicant's workers. The cattle were driven from the paddocks to the abattoir where there is no grazing and a truck which brought feed was refused entry at the main gate. On 30 October 2009, the respondents attempted to forcibly take over the farm compound from the applicant resulting in the gun shot injury to five of the applicant's employees and the destruction of the property of its employees. While the first respondent filed an opposing affidavit denying the averments made by the applicant, it was apparent from the supporting affidavit attributed to the second respondent that the applicant had full control and custody of a portion of the farm that was referred to its founding affidavit from July 2007 until the events of 29 and 30 October 2009.

The preliminary issues

The first respondent raised three preliminary issues. The first was that the application was defective for the non-joinder of the acquiring authority. The second was that the applicant did not have the *locus standi* to bring the present application and the third was that the court

did not have jurisdiction to deal with the application. I dismissed all the preliminary points that were raised and proceeded to hear the matter on the merits.

In my view, the non-joinder of the acquiring authority was not fatal to the application for the reason that the applicant sought relief against the parties it alleged had forcibly removed it from the farm. The acquiring authority did not use physical force to remove the applicant from the farm. It was apparent from the averments of the applicant that the acquiring authority was utilizing the criminal justice system to remove the applicant from the farm through the medium of the provisions of s 3 (5) of the Gazetted Land (Consequential Provisions) Act [*Cap 20:28*].

The contention by Mr *Mlotshwa* that the applicant lacked the necessary *locus standi* to launch these proceedings was rooted in ownership rights. In *Chisveto* v *Minister of Local Government and Town Planning* 1984 (1) ZLR 248(H) at 250B-D REYNOLDS J stated that:

> "Lawfulness of possession does not enter into it. … Thus it is my view that the lawfulness or otherwise of the applicant's possession of the property in question does not fall for consideration at all. In fact, the classic generalisation is sometimes made in respect of spoliation actions that even a robber or a thief is entitled to be restored to possession of the stolen property."

These views were affirmed by KORSAH JA in *Magadzire* v *Magadzire & Ors* SC 196/98 at p 2 of the cyclostyled judgment when he stated:

> "A spoliation order has nothing to do with the rights of ownership in the property as the trial court suggested."

The last preliminary issue was that this court did not have authority to restore the *status quo ante* because in so doing it would grant the applicant the right to stay on the property. It seems to me that this court has the jurisdiction to entertain spoliatory proceedings. A plethora of cases have set out the basis for granting such an extraordinary remedy. It is to prevent self help. It seeks to encourage the despoiler to have recourse to the due process. The restoration of the despoiled party is not permanent but temporary. It does not stop the despoiler from seeking the proper eviction of the despoiled party.

It was for these reasons that I dismissed all the three preliminary issues raised by the first respondent.

The merits

Mr *Mpofu* submitted that the applicant was merely required to establish evidence of a *prima facie* right of spoliation against the respondents. That submission is contrary to

authority. In *Blue Rangers Estates* (*Pvt*) *Ltd* v *Muduviri & Anor* SC 29/09 at p 13 of the cyclostyled judgment MALABA DCJ stated that "a spoliation order cannot be granted on the evidence of a *prima facie* right". The onus lies on the applicant to establish on a balance of probabilities that it has been despoiled.

Counsel were agreed on the two essential elements for spoliation. They were set out by GUBBAY CJ in *Botha & Anor* v *Barret* 1996 (20 ZLR 73 (S) at 79 D-F thus:

> "It is clear law that in order to obtain a spoliation order two allegations must be made and proved. These are:
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> (a) that the applicant was in peaceful and undisturbed possession of the property; and,
> (b) that the respondent deprived him of the possession forcibly or wrongfully against his consent.
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> See *Nino Bonino* v *de Lange supra* at 122; *Kramer* v *Trustees Christian Coloured Vigilance Council, Grassy Park* 1948 (1) SA 748 (C) at 753; *Davis* v *Davis* 1990 (2) ZLR 136 (H) at 141C".

Mr *Mpofu* submitted that the applicant made and proved both these essential elements. I am satisfied that the applicant demonstrated that it was in possession of the portion of the farm which the respondents have forcibly taken away from it. Mr *Mlotshwa,* however, argued that while the applicant was in possession of the portion in issue, that possession was neither peaceful nor undisturbed. He contented that the possession was shaken by the compulsory acquisition and the criminalization of the applicant's continued stay in defiance of the Gazetted Land (Consequential Provisions) Act, *supra*.

In *Gifford* v *Muzire & Ors* HH 69-07 at p 7 of the cyclostyled judgment I expressed myself on the point in this manner:

> "In my view, it was common cause that the applicant had physical control of the farm in question before the new farmers occupied it on 22 August 2007. I however hold that, by operation of law, by 4 February 2007, his possession was no longer peaceful and undisturbed. The Gazetted Land (Consequential Provisions) Act was the source of the disturbance. Transient relief came for him in the form of the notice of eviction of 12 March 2007, which was served on him on 3 April 2007. The acquiring authority authorized him, as it is wont to do by virtue of s 3(2) (a) of the Gazetted Land (Consequential Provisions) Act, to stay until 30 June 2007. From 30 June to 22 August 2007 he remained in physical control of the farm even though his continued stay was illegal. In my view, possession that is tainted with illegality cannot be peaceful and undisturbed. The notice of eviction and his response to it of 16 April 2007 underscored the point that he was no longer in a peaceful and tranquil state of mind. I, therefore find that he neither had the right of nor the right to possess the farm. The absence of the mental right undermined the physical act. In my view, by operation of law, he did not

> have peaceful and undisturbed possession of the farm after 30 June 2007. But even if I am wrong on the application of the mental aspect of possession, and such possession denotes physical control only, it seems to me that the applicant's case would still fail on the basis of the second essential element of spoliation."

The submission of Mr *Mlotshwa* and the sentiments I expressed in the *Gifford* case overlooked the definition of undisturbed and peaceful possession that was approved by ADAM J in *Davis v Davis* 1990 (2) ZLR 136 (H) and affirmed by GUBBAY CJ in *Botha & Anor v Barret, supra.* At 41E-F ADAM J quoted with approval the observations of ADDELSON J in *Bennett Pringle (Pty) Ltd* v *Adelaide Municipality* 1977 (1) SA 230(E) that:

> In terms of all the authorities cited, the 'possession', in order to be protected by a spoliatory remedy, must still consist of the *animus* - the 'intention of securing some benefit to' the possessor; and of *detentio*, namely the 'holding' itself . . . If one has regard to the purpose of this possessory remedy, namely to prevent persons taking the law into their own hands, it is my view that a spoliation order is available at least to any person who is (a) making physical use of property to the extent that he derives a benefit from such use; (b) Intends by such use to secure the benefit to himself; and (c) is deprived of such use and benefit by a third person."

It is apparent from the definition of possession that the mental element is met once the possessor intends to derive some benefit from his possession. That intention does not appear to be affected by the criminalization of his conduct.

The facts adduced on behalf of the applicant in the founding affidavit demonstrated that it had both the intention of securing some benefit and the physical control of the portion of the farm in question. These were not affected by the compulsory acquisition of the farm or by provisions of the Gazetted Land (Consequential Provisions) Act. Unlike in the *Gifford* case, *supra,* the applicant demonstrated and the respondent did not challenge its averment that it did not consent to the dispossession of its possessory right. The applicant established on a balance of probabilities that it had been despoiled and is thus entitled to the remedy it sought.

In *Airfield Investments* (*Pvt*) *Ltd* v *Minister of Lands & Ors* 2004 (1) ZLR 511 (S) 518C MALABA JA, as then was, held that an interim interdict as a remedy for unlawful conduct could not be granted for the protection of the illegal activities of the appellant. Paragraph 2 of the interim relief sought is in the nature of an interim interdict. It is a remedy that is not available to the applicant. I will accordingly delete this paragraph from the draft order.

I, accordingly grant the following interim relief;

Pending the return day, it is hereby ordered that:

The respondents or any person acting on their behalf or for the purpose of furthering their interests shall be and are hereby ordered to restore to the applicant's possession such amenities as were immediately before 29 October 2009 under the applicant's use and control including proper access to the main entrance to the farm, the piggery, the crocodile pens, the paddocks, the farm compound, the office house, until the finalization of this matter on the return date.

Coghlan Welsh & Guest, applicant's legal practitioners
Antonio, Mlotshwa & Co, respondents' legal practitioners